UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

KAUFMAN AND BROAD HOME CORPORATION, et al.,	)	
Plaintiffs	)	
v.	)	***Docket No. 99-160-P-C***
LANDMARK AMERICA, L.L.C., et al.,	)	
Defendants	)	

ORDER APPROVING ATTACHMENT AND TRUSTEE PROCESS

After notice to defendants Landmark America, L.L.C. ("Landmark") and Pamela W. Gleichman and hearing on affidavits,[1] I find that it is more likely than not that the plaintiffs will recover judgment in this action against these defendants, including interest and costs, in an amount equal to or greater than Three Million Nine Hundred Ninety Thousand Dollars ($3,990,000.00), and that there is no liability insurance or any property or credits attached by other writ or attachment or by trustee process shown by these defendants to be available to satisfy such a judgment.

This finding is based on the documents upon which the plaintiffs' claims are based: a reimbursement agreement dated September 10, 1997 signed by Landmark, Reimbursement Agreement (copy attached to Memorandum of Law in Support of Plaintiffs' Motion for Approval of Attachment and Attachment on Trustee Process Against Defendants Landmark America, L.L.C. and Pamela W. Gleichman ("Memorandum") (Docket No. 3) as Exhibit 6), and a guarantee signed by Pamela W.

[1] The plaintiffs have requested oral argument on the motion. Request for Hearing (Docket No. 16). I am satisfied that the written submissions of the parties adequately address the issues raised. Accordingly, the request for oral argument is denied.

Gleichman , Guaranty (copy attached to Memorandum as Exhibit 7). Each of these documents recites that it is made "in favor of Kaufman and Broad Home Corporation . . . and Kaufman and Broad Multi-Housing Group, Inc.," Agreement at 1, Guaranty at 1, the plaintiffs in this action. Landmark and Gleichman do not dispute that the demands for payment that trigger Landmark's obligation to reimburse the plaintiffs under the Reimbursement Agreement and Gleichman's obligation to pay the plaintiffs under the Guaranty have occurred. Rather, they contend that their affirmative defenses and counterclaims "discharge any obligations of Defendants" under these documents. Defendants' Objection to Plaintiffs' Motion for Attachment, etc. ("Defendants' Objection") (Docket No. 8) at 13. This contention is based on the plaintiffs' alleged failure to enter into tri-party agreements among themselves, the defendants and the bank that provided the loans the alleged default of which is the triggering event for the enforcement of the Reimbursement Agreement and Guaranty, by which the plaintiffs would provide financing that would, *inter alia*, pay off the initial loans. *Id*. at 13-20. Landmark and Gleichman assert that the plaintiffs undertook this obligation orally and in correspondence, Second Affidavit of Pamela W. Gleichman (Docket No. 9), ¶¶ 19-20, 22, 25, 32, and in letters of intent between Kaufman and Broad Multi-Housing Group, Inc. and Gleichman, *id*. Exhs. D-G.

Neither Landmark nor Kaufman and Broad Home Corporation was a party to any of these letters of intent. Landmark and Gleichman rely on identical passages in each such letter: "KBMH [Kaufman and Broad Multi-Housing Group, Inc.], upon its review and approval, will enter into a Triparty agreement with the Construction Lender should it be required." *E.g.*, Letter from Mohannad H. Mohanna, Senior Project Manager, Kaufman and Broad Multi-Housing Group, Inc., to Ms. Pamela Gleichman re Terrace Springs (Exh. D to Gleichman Aff.) § A.5.e at 4. The term "Triparty agreement" is not defined in the letters, which also provide that Kaufman and Broad Multi-Housing Group, Inc. "shall have no obligation to repay or guaranty the repayment of [construction] loans or offer to pledge

any security for the repayment thereof." *Id.* § A.5.b at 3. Since Landmark is not a party to these letters, it cannot enforce them. Since Kaufman and Broad Home Corporation is not a party to these letters, they cannot be enforced against it.[2] The passages upon which Gleichman relies will not bear the weight she seeks to impose upon them. They do not excuse her liability to either plaintiff under the Guaranty.

None of the correspondence cited by Landmark and Gleichman binds either of the plaintiffs to enter into the "tri-party takeout agreements," an example of which is Exhibit B to the Gleichman Affidavit, that these defendants contend were a condition precedent to their performance of the Reimbursement Agreement and the Guaranty.[3] That leaves for consideration only the alleged oral promises of one or both of the plaintiffs set forth in paragraphs 19 and 20 of the Gleichman affidavit.[4] The Guaranty provides, *inter alia*, that Gleichman waives "any defense, right of set-off or other claim or right which . . . Guarantor or [Landmark] may have against [the plaintiffs] from time to time," and that she has relinquished "numerous possible defenses to the enforceability of [the obligations undertaken by her that] may presently exist and/or may arise hereafter." Guaranty §§ 4(m) at 4 & 16(b) at 10. These contractual waivers are sufficient to include any defenses that are based on the alleged oral promises. Accordingly, Gleichman has not shown a likelihood of success on any of the affirmative defenses set forth in her opposition to the motion.

The Reimbursement Agreement in similar fashion provides that Landmark's obligations

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[2] Gleichman's signatures on the letters of intent are all dated after the dates of the Reimbursement Agreement and the Guaranty, *e.g., id*. at 17, but it is not at all clear which documents were signed first, or indeed whether all were signed at approximately the same time.

[3] Those documents themselves certainly do not mention any such conditions precedent.

[4] Gleichman's testimony that such promises were made is directly contradicted by the affidavits of the two individuals whom she names as the makers of the promises. Affidavit of Michael A. Costa, Exh. A to Plaintiffs' Reply to Defendants' Objection to Plaintiffs' Motion for Attachment, etc. ("Plaintiffs' Reply") (Docket No. 17), ¶¶ 9, 14; Affidavit of Albert J. Marshall, Exh. C to Plaintiffs' Reply, ¶ 4.

thereunder are "absolute, unconditional and irrevocable, and shall be performed strictly in accordance" with its terms, "under all circumstances whatsoever, including . . . the existence of any claim, set-off, defense or other rights which Landmark [or Gleichman] . . . may, [sic] have at any time against [Kaufman and Broad Home Corporation] or [Kaufman and Broad Multi-Housing Group, Inc.] . . . whether in connection with this Agreement, any Related Document [defined to include the letters of intent] or any unrelated transaction." Reimbursement Agreement §§ 1 at 4 (definitions of "Letter of Intent" and "Related Documents") & 4(A)(3) at 10. This passage has the same effect as does the quoted language from the Guaranty.

The plaintiffs in their reply memorandum do not contest the defendants' calculation of the appropriate amount of the attachment or the appraisals upon which that calculation is based, Defendants' Objection at 21-22 & Affidavit of Judi Fishman (Docket No. 13) & Exhs. P-R thereto, and I find that calculation to be reasonable and supported by the appraisals.

For the foregoing reasons, it is **ORDERED** that attachment, including attachment on trustee process, may be made by the plaintiffs, Kaufman and Broad Home Corporation and Kaufman and Broad Multi-Housing Group, Inc., against the property of Landmark America, L.L.C. and Pamela W. Gleichman in the amount of Three Million Nine Hundred Ninety Thousand Dollars ($3,990,000.00).

Dated this 14th day of July, 1999.

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David M. Cohen
United States Magistrate Judge